carriers rates equal to the incremental costs to the utility caused by their use of the utility's right-of-way. Because this approach is prospective in nature, it avoids the incentive of a utility to seek compensation for a proportionate share of the "historic costs" that may be embedded in the maintenance of rights-of-way but which have already been recovered. Moreover, the utility should have the ability to document and justify incremental costs thereby simplifying review in the event of disputes.[17]

It is entirely possible that the incremental cost of telecommunications carrier access will be zero, assuming that the carrier granted access bears equipment and installation expenses. In a proceeding before the Texas Public Utility Commission, Southwestern Bell Telephone Company recently stated that, in most instances, it had obtained building access at no cost.[18]

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[17] In the Appendix, Teligent recommends use of the Commission's pole attachment complaint procedure for the resolution of right-of-way access rate disputes. However, Teligent believes that the Commission's alternative dispute resolution ("ADR") process may provide another forum for resolution of right-of-way access rate disputes. The ADR process, in conjunction with a baseline methodology, would allow due consideration of any unique variables that may arise in the right-of-way context.

[18] Questions Regarding Rights of Telecommunications Utilities and Property Owners Under PURA Building Access Provisions, Project No. 18000, *Southwestern Bell Telephone Company's Comments* at 8 (Tex. PUC, filed Oct. 2, 1997) ("SWBT Texas Building Access Comments) ("certain facilities (e.g., conduit cable and wiring) may have been placed by [a] telecommunications utility under an easement or other agreement between the utility and the property owner. Often, those facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider").

Teligent is of the understanding that Southwestern Bell's situation is representative of the normal historic practices of utilities. If a utility bears no cost to hold an easement through or on a building, allowing it to recover access fees for occupation would not be cost-based and, hence, would exceed a "just and reasonable" rate.[19]

## VI. THE TERMS OF UTILITIES' PRIVATE EASEMENTS CANNOT BAR TELECOMMUNICATIONS CARRIERS' ACCESS.

Many incumbent utilities claim that their private rights-of-way do not permit access or use by third parties, that their private rights-of-way do not permit uses different from existing uses, or that negotiation with, approval by, and compensation to the owner of the underlying fee is required before access may be granted. These conditions undermine the terms of Section 224. If given effect, they would demand duplication of a monopolist's network by competitors -- an impossible result sought to be avoided by the 1996 Act.

As Teligent discussed in its Comments, the 1996 Telecommunications Act represents a statutory design that seeks to promote competition on the basis of service and rates rather than allowing market dominance through exertion of historic monopoly power. To give operative effect to this goal, the Act

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[19] AT&T observes that despite the unique circumstances surrounding rights-of-way, a uniform set of principles must govern access and rates must be based on cost. AT&T Comments at 18. AT&T suggests a presumption that a utility has already recovered the capital costs of obtaining the rights-of-way, and the occupants need only pay for direct and incremental costs. Id. Teligent supports AT&T's proposal.

extends to competitors access to and use of those bottleneck facilities used, owned, or controlled by incumbents as a function of their historic monopoly status.[20] By granting access to the essential facilities owned or controlled by utilities, the Pole Attachment Act was the forerunner of this larger scheme. Through enactment of the original Pole Attachment Act, Congress sought to promote the growth and development of cable television systems. In 1996, Congress redesigned the same tool to operate with an expanded scope in order to promote competition in local exchange and other telecommunications services.

When viewed together, the cases demonstrate that the design manifested in the Pole Attachment Act of 1978 and the Telecommunications Act of 1996 may be promoted in the manner recommended by Teligent.[21] These cases recognize that

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20 SWBT Texas Building Access Comments at 12 ("before the presence of competitive choices of telecommunications utilities, incumbent providers placed facilities as the provider of last resort").

21 Nor does the Eighth Circuit decision operate to cast doubt on the Commission's jurisdiction in this matter. In Iowa Utilities Board, the court observed that because Congress amended Section 2(b) to grant exclusive jurisdiction to the Commission over the regulation of CMRS rates and entry, Commission action taken pursuant to Section 332 is not subject to the traditional Section 2(b) analysis. See Iowa Utilities Board v. F.C.C., 120 F.3d 753, 800 n.21 (8th Cir. 1997). The same analysis would apply to the Commission's authority to regulate access to rights-of-way under Section 224. As with Section 332, Congress expressly exempted Section 224 from the reach of Section 2(b). See 47 U.S.C. § 152(b)("Except as provided in sections 223 through 227, inclusive, and Section 332 . . . "). Therefore, the Commission retains exclusive authority to interpret and implement the terms of Section 224 without Section 2(b) limitations and subject only to a State's appropriate use of the reverse preemption provision contained in Section 224. To use the language of the Eighth Circuit, the Commission

statutorily designated third parties may lawfully access the rights-of-way owned or controlled by utilities without the need for negotiations with, approval of, and compensation to the owner of the servient property. As the Eleventh Circuit stated:

> Since most developers voluntarily grant easements for use by utilities . . . Congress may force the developer to allow a cable franchise to use the easement without offending the taking[s] c[l]ause of the Constitution. Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user.[22]

In ruling on whether an electric utility's easement would allow a cable operator to gain access to a subdivision through use of such easement, the Fourth Circuit determined that:

> [t]he fact that an additional wire would be introduced to the many others on the poles

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has no "2(b) fence" to overcome in its regulation under Section 224.

[22] Centel Cable Television v. White Development Corp., 902 F.2d 905, 910 (11th Cir. 1990)(quoting Centel Cable Television v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988)). Some cases have expressed an unwillingness to permit a cable operator's access to any building linked to electric, telephone, or video services. See, e.g., Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992); see also Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993). However, these cases were decided under 47 U.S.C. § 621(a)(2). Section 621(a)(2)'s compensation mechanism is designed only for damages from the installation, operation or removal of facilities whereas Section 224 is designed to provide "just and reasonable" compensation for access separate from the aforementioned damages. Moreover, by its terms, Section 621(a)(2) is limited to public rights-of-way and dedicated easements, whereas Section 224 is not so limited.

> does not impose any meaningful increase of burden on [the servient estate's] interest in the underlying property. . . . Moreover, the electrical signals themselves provide no basis for distinction for purposes of measuring the increased burden on the servient estate. Any possible difference would be impalpable and would not impose an additional burden on the servient estate.[23]

Ultimately concluding that the cable operator could use the electric utility's easement over private property, the court noted that it was immaterial for easement purposes that the cable operator was not a telephone company, stating that "[t]he transmissions of a telephone company are virtually indistinguishable from transmissions of a non-telephone company transmitting television signals for purposes of a pole and wire easement grant."[24]

In practice, a private easement's prohibition of telecommunications carrier access to the right-of-way appears to be an issue overstated by the incumbent utilities. The New York State Investor Owned Electric Utilities note that the leading New York case held that "utility company easements are apportionable

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23 C/R TV v. Shannondale, 27 F.3d 104, 109 (4th Cir. 1994).

24 Id. Moreover, to the extent that a clause allowing "reasonably necessary" use of the easement exists in an easement contract, the Ninth Circuit has held that "compliance with mandatory federal programs imposing legal obligations on [the utility] is 'reasonably necessary' to the installation of [additional facilities within the easement]." Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 9 F.3d 1394, 1396 (9th Cir. 1993).

to cable operators even though the scope of the easement may not specifically include CATV."[25] They go on to state that:

> [a]pportioning the rights granted in existing utility easements has been acknowledged by the courts as the most economically feasible and least environmentally damaging way of installing cable [telecommunications] systems. Prohibiting cable and telecommunications companies from using such easements until compensation is paid to the landowners or until condemnation proceedings are instituted would greatly increase the cost to these companies and possibly deny the public the benefits of telecommunications competition.[26]

Moreover, in the "Access to Poles, Conduit and Rights of Way: Technical Service Description" filed with the Commission by BellSouth in connection with its South Carolina Section 271 application, BellSouth states the following:

> Where BellSouth has any ownership or rights-of-way to buildings or building complexes, or within buildings or building complexes, BellSouth will offer to CLEC through a license or other attachment the right to use any available space owned or controlled by BellSouth in the building or building complex to install CLEC equipment and facilities as well as ingress and egress to such space.[27]

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25 New York State Investor Owned Electric Utilities Comments at 25.

26 Id.

27 Application by BellSouth Corporation for Provision of In-Region, InterLATA Services, CC Docket No. 97-208, *Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina*, Attachment to Affidavit of W. Keith Milner, Appendix A, Exh. WKM-9, "CLEC Information Package: Access to Poles, Ducts, Conduit and Right of Way" at 3 (filed Sep. 30, 1997).

This offer suggests that BellSouth believes it may lawfully offer such access to its private rights-of-way.

Finally, electric utilities may already use their electric easements for purposes other than the transmission of electricity. Indeed, the Commission's rules contemplate the conduction of radio signals through public utility A/C power lines for transmission to AM radio receivers.[28] Moreover, the Wall Street Journal recently reported on technological advances by United Utilities and Northern Telecom which may permit the provision of telephone service and Internet access service over the power lines that bring electricity to homes and businesses.[29] Electric utility research of this sort suggests that electric utilities themselves view their electric easements as compatible with the provision of telecommunications services. The Commission should affirm that utilities' private rights-of-way are accessible by carriers offering different services and using similar facilities.[30]

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28 See 47 C.F.R. § 15.207 (establishing electric utility conduction limits).

29 See Gautum Naik, "Electric Outlets Could Be Link To the Internet," Wall Street Journal at B6 (Oct. 7, 1997).

30 See Telecommunications Services Inside Wiring, CS Docket No. 95-184, *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-376 at ¶ 180 (rel. Oct. 17, 1997)(the Commission recognizing its authority to review restrictions imposed upon the use of existing easements or rights-of-way to provide new or additional services).

## VII. CONCLUSION

In conclusion, Teligent urges the Commission to provide the needed guidance and promote local competition by adopting a right-of-way access methodology consistent with the principles recommended herein.

Respectfully submitted,

TELIGENT, L.L.C.

By: _____
Philip L. Verveer
Gunnar D. Halley


Laurence E. Harris
David S. Turetsky
Terri B. Natoli

**TELIGENT, L.L.C.**
8065 Leesburg Pike
Suite 400
Vienna, VA 22182
(703) 762-5100

**WILLKIE FARR & GALLAGHER**
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys for TELIGENT, L.L.C.


Dated: October 21, 1997

## APPENDIX

**§ _____ Compensation for Access to Rights-of-Way**

(a) *Rates:* Nondiscriminatory access for telecommunications carriers and cable operators shall be granted to rights-of-way owned or controlled by utilities in accordance with 47 U.S.C. § 224. Just and reasonable rates for access to a utility owned or controlled right-of-way, as distinct from attachment to or in a utility facility, shall not exceed the incremental cost to the utility of a telecommunications carrier's or a cable operator's access to the right-of-way. It shall be presumed that the incremental cost of a telecommunications carrier's or cable operator's access to a right-of-way owned or controlled by a utility is zero.

(b) *Rebuttals:* A utility may rebut the zero incremental cost presumption through the complaint procedure applicable to rights-of-way established in Subpart J of Part 1 of the Commission's rules.

(c) *Standard of review:* The utility must proffer substantial evidence of the actual incremental costs imposed by the telecommunication carrier's or cable operator's right-of-way access for successful rebuttal of the zero incremental cost presumption.

(d) *Access Status Pending Decision:* During the course of a right-of-way rate complaint proceeding before the Commission, a utility must grant access or continue to permit the telecommunications carrier's or cable operator's access to the utility's right-of-way at the zero incremental cost rate.

(e) *Indemnification:* A utility successful in a right-of-way dispute with a telecommunications carrier or cable operator may obtain from the telecommunications carrier or cable operator indemnification for the difference between the zero incremental cost rate and the rate determined by the Commission to be just and reasonable as compensation for access pending resolution of the dispute.

**CERTIFICATE OF SERVICE**

I, Gunnar D. Halley, do hereby certify that on this 21st day of October, 1997, copies of the foregoing "Reply Comments of Teligent, L.L.C." were delivered by hand to the following parties:

Chairman Reed Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, DC 20554

William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Meredith J. Jones, Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 918
Washington, D.C. 20554

JoAnn Lucanik
Chief, Policy Division
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 406A
Washington, D.C. 20554

Rick Chessen
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 406-F
Washington, D.C. 20554

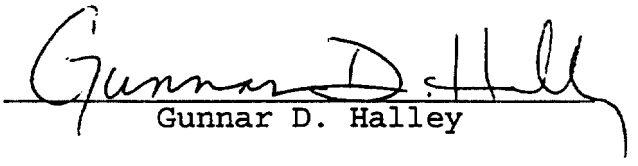
John E. Logan
Deputy Chief
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W.
Suite 918
Washington, D.C. 20554

Claire Blue
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W., Room 406-A
Washington, D.C. 20554

Donnie Fowler
Special Advisor to
Meredith Jones
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W., Room 917
Washington, D.C. 20554

Michael Lance
Deputy Chief
Engineering & Technical
Services Division
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W., Room 201-O
Washington, D.C. 20554

John P.Wong
Division Chief
Engineering & Technical
Services Division
Cable Services Bureau
Federal Communications
Commission
2033 M Street, N.W.,
Room 201-N
Washington, D.C. 20554


Gunnar D. Halley

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.



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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 703(e) of the Telecommunications Act of 1996 | ) | CS Docket No. 97-151 |
| | ) | |
| Amendment of the Commission's Rules and Policies Governing Pole Attachments | ) | |

**PETITION FOR RECONSIDERATION AND CLARIFICATION OF TELIGENT, INC.**

Laurence E. Harris
David S. Turetsky

**TELIGENT, INC.**
Suite 400
8065 Leesburg Pike
Vienna, VA 22182
(703) 762-5100

Philip L. Verveer
Gunnar D. Halley

**WILLKIE FARR & GALLAGHER**
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys for
Teligent, Inc.

April 13, 1998

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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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| Implementation of Section 703(e) of the Telecommunications Act of 1996 | ) | CS Docket No. 97-151 |
| | ) | |
| Amendment of the Commission's Rules and Policies Governing Pole Attachments | ) | |

**PETITION FOR RECONSIDERATION AND CLARIFICATION OF TELIGENT, INC.**

Teligent, Inc. hereby respectfully requests the Commission to reconsider its decision to address complaints about access to utilities' rights-of-way on a case-by-case basis and to clarify certain standards as they apply to the same.[1]

## I. INTRODUCTION AND SUMMARY

Generally, the Telecommunications Act of 1996 and the efforts of the Commission aspire to elimination of those relative advantages of monopolist incumbency that could impair the development of local exchange competition (and the accrual of competitive benefits to consumers). A component of the utilities' incumbency is the control or ownership of public and

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[1] Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, FCC 98-20 (rel. Feb. 6, 1998)("Report & Order").

private rights-of-way for facility installation. Section 224 extends to telecommunications carriers access to those rights-of-way in order to facilitate the development of competition.

The Commission should clarify that Section 224's reference to rights-of-way includes those private rights-of-way secured by utilities through and on top of buildings. Moreover, the Commission should emphasize that nondiscriminatory access to these rights-of-way must be provided on just and reasonable terms. Finally, consistent with its statutory obligations, the Commission should offer more specific guidance as to the meaning of "just and reasonable" access to rights-of-way.

The use of bare utility rights-of-way facilitates the provision of fixed wireless services and CLEC offerings. Yet, some building owners impose unreasonable barriers to building access (examples of which are provided below) which threaten to diminish consumer welfare. Commission actions consistent with this Petition will advance the facilities-based delivery of competitive benefits to consumers.

## II. THE REPORT & ORDER FAILS TO ACHIEVE THE COMMISSION'S STATUTORY OBLIGATIONS.

The Commission recognizes that a utility must provide a requesting telecommunications carrier with nondiscriminatory access to any right-of-way owned or controlled by it.[2] However, the Report & Order goes on to explain that "there are too many different types of rights-of-way" to develop a rate methodology.[3]

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[2] Id. at ¶ 117.

[3] Id. at ¶ 120.

Moreover, it notes the varied state and local restrictions that may burden rights-of-way.[4] Finally, the Commission claims it possesses insufficient information to adopt detailed standards to govern all right-of-way situations.[5] Consequently, the Report & Order declines to adopt a methodology, declines to adopt detailed access and rate standards, and decides to address right-of-way access and rate complaints on a case-by-case basis. In short, the Report & Order does little more to advance right-of-way access than acknowledge that Section 224's terms extend to rights-of-way. The Commission's inaction is legally insufficient and carries negative implications for local exchange competition.

The language of Section 224 is mandatory, not permissive; it imposes upon the Commission an obligation to govern in an affirmative manner the charges for access to rights-of-way. Specifically, the statute states that "the Commission shall regulate the rates, terms, and conditions" for access to rights-of-way,[6] "shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions,"[7] and "shall prescribe by rule regulations to carry out the provisions of this section."[8] Moreover, the statute states that "[t]he Commission shall . . . prescribe regulations .

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4 Id.

5 Id. at ¶ 121.

6 47 U.S.C. § 224(b)(1)(emphasis added).

7 Id. (emphasis added).

8 47 U.S.C. § 224(b)(2)(emphasis added).

. . to govern the charges for [rights-of-way]."[9] Established canons of statutory interpretation direct construction of "shall" as an imperative instruction.[10] The Commission must do more than concede the operation of the statute; it must act to implement it.

The statute also prescribes the manner in which the Commission exercises its obligations. Typically, in developing law and policy, an administrative agency retains the discretion to utilize either adjudicatory or rulemaking processes.[11] In this instance, however, the statute removes such discretion from the Commission through elimination of the adjudication option. The Act expressly requires the Commission to prescribe rules rather than adjudicate matters on a case-by-case basis.[12] Properly considered, the language of Section 224 imposes upon the Commission an affirmative obligation to establish rules governing the rates and terms of access to rights-of-way. The Report &

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9 47 U.S.C. § 224(e)(1)(emphasis added).

10 See, e.g., Bennett v. Spear, 117 S.Ct. 1154, 1167 (1997)(referring to "shall" as imperative language); Anderson v. Yungkau, 329 U.S. 482, 485 (1947)("The word 'shall' is ordinarily the 'language of command.'")(citing Escoe v. Zerbst, 295 U.S. 490, 493 (1935)).

11 See S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947)("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

12 47 U.S.C. §§ 224(e)(1)("The Commission shall . . . prescribe regulations . . . to govern the charges for [rights-of-way] used by telecommunications carriers to provide telecommunications services . . . . Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for [rights-of-way].").

Order's abdication of this responsibility in favor of a more ad hoc approach is legally deficient.

An active Commission role in securing nondiscriminatory access to rights-of-way at just and reasonable rates is necessary to accomplish the broader objective of Section 224: making available, through regulatory intervention, the bottleneck facilities to which access is a prerequisite for effective local exchange competition.[13] Local utility monopolists -- whether electric utilities, incumbent local exchange carriers, or gas companies -- have no incentive beyond regulatory compliance to permit competitors (or potential competitors) access to their essential facilities. The level of vigor with which the Commission pursues access to rights-of-way for competitive telecommunications carriers will relate not only to the speed with which local exchange competition develops but also to the effectiveness of that competition.

The passive approach taken by the Report & Order does little to promote the policy behind Section 224. Carriers and utilities receive little guidance from a case-by-case method of addressing right-of-way access.[14] Moreover, this ad hoc approach provides

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13 See Report & Order at ¶ 2 ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); see also id. at ¶ 5 (noting "Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants").

14 See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Second*

no disincentive to utilities to resist right-of-way access requests or otherwise charge unreasonable rates. By contrast, some guidance from the Commission will facilitate negotiations for access to utilities' rights-of-way. The Commission affirms its belief

> that the existing methodology for determining a presumptive maximum pole attachment rate . . . facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.[15]

Although this rationale holds equally true for rights-of-way, it is not so applied in the Report & Order.

The Report & Order alludes to the restrictions on rights-of-way imposed by state and local laws as a barrier to developing a generally applicable right-of-way rate methodology. In this instance, federalist principles do not excuse compliance with statutory obligations.[16] Section 224 and the rest of the

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*Report and Order and Memorandum Opinion and Order*, 4 CR 484 at ¶ 231 (1996)("Requiring carriers to litigate the meaning of 'reasonable' notice through our complaint process on a case-by-case basis might slow the introduction and implementation of new technology and services, and burden both carriers and the Commission with potentially lengthy, fact-specific enforcement proceedings.").

15 Report & Order at ¶ 16.

16 Generally considered, the effect of the federal law must be deemed to prevail over State law in the event of a conflict. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941)(federal law will prevail over State law where the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Although 47 U.S.C. 152(b) generally denies the Commission authority over intrastate communications, in the appropriate circumstances, Commission preemption of inconsistent state regulation is permissible under the "impossibility exception." See Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 375 (1986). This exception gives effect to the notion that "Congress has recognized the existence of areas of common national and state concern and has provided a

Communications Act make it inappropriate and insufficient for the Commission to pass responsibility for access to rights-of-way to States and municipalities; it must prescribe federal rules.[17]

Jurisdictionally, the Commission's authority to regulate rights-of-way within and on top of cultural features such as office buildings is unquestionable and long-standing. Section 224 provides a clear and direct command to prescribe rules governing the rates and terms for telecommunications carriers' access to utilities' rights-of-way.[18] Given the Commission's expansive jurisdiction and the compelling reasons for actively ensuring just, reasonable, and nondiscriminatory access to utilities' rights-of-way, it is inadequate for the Commission to abdicate such responsibility to States and municipalities.

## III. THE COMMISSION SHOULD CLARIFY THE PARAMETERS OF REASONABLE RIGHT-OF-WAY ACCESS TERMS AND RATES.

If the Commission deems a generally applicable right-of-way rate formula unworkable at this time, it nevertheless is entirely appropriate -- indeed, advisable -- for the Commission to offer some additional definition and explanation of access rights and rate ceilings in the context of rights-of-way. Clarification of reasonableness in the right-of-way context will smooth

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procedure under which national primacy is recognized." North Carolina Utilities Comm'n v. F.C.C., 537 F.2d 787, 794 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976).

17 Of course, Section 224 contemplates assumption of right-of-way responsibility by some States. 47 U.S.C. § 224(c). However, the Commission must develop rules for those States that choose not to regulate rights-of-way consistent with the requirements of Section 224.

18 47 U.S.C. § 224(e)(1).

negotiations between parties and otherwise reduce inefficient transaction costs of entering into right-of-way access agreements.

For example, the Commission should confirm that Section 224 access rights apply to private rights-of-way that exist within buildings and on building rooftops. The premise appears self-evident. However, the Commission's reluctance to extend access to rooftops of ILEC corporate buildings qua corporate property[19] has led some parties to conclude erroneously that the Commission's narrow statement implicated even those buildings through which a utility retains private rights-of-way. The Commission should eliminate the confusion by confirming that Section 224's access extends to utilities' private rights-of-way through buildings (including rooftops).[20] Moreover, the Commission should emphasize that utilities must provide this access to telecommunications carriers and cable operators on a nondiscriminatory basis.[21]

At minimum, to be consistent with the statute's direction, the Commission must develop a general proposition of just and

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19 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1185 (1996).

20 As Teligent explained in its comments, the rights-of-way to which telecommunications carriers are granted access in Section 224 are not limited to public rights-of-way (in contrast to Section 253(c), for example), but include private rights-of-way, as well. See Teligent Comments at 6. This extends Section 224's application beyond public thoroughfares into rights-of-way secured through private property, such as office buildings.

21 47 U.S.C. § 224(f)(1).

reasonable rates and access conditions for rights-of-way. The Commission's statutory responsibility may not require the Commission to establish the actual rates for right-of-way access or to exhaustively list the terms of a just and reasonable agreement. Nevertheless, identification of even notional parameters would promote negotiated agreements in the same manner that the formula for pole attachment rates "facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate."[22] Moreover, general parameters for just and reasonable rates and terms for right-of-way access will provide a known standard to apply in the resolution of complaints.

The pro-competitive goals of the 1996 Telecommunications Act would be well-served by additional definition and explanation of right-of-way access rights and rate ceilings.[23] In furtherance of those goals, the Commission should emphasize that utilities must provide telecommunications carriers with nondiscriminatory access to rights-of-way on just and reasonable terms, including those rights-of-way located within buildings and on building rooftops.

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22 Report & Order at ¶ 16. Indeed, the Commission identified stalled negotiations as an impediment to competition. See id. at ¶ 17 ("Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.").

23 See id. at ¶ 5 (noting "Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants") (citation omitted).

## IV. FIXED WIRELESS CARRIERS AND OTHER CLECS USE RIGHTS-OF-WAY WITHOUT ATTACHING TO THE UTILITY'S FACILITIES.

The Report & Order asserts a general dearth of examples in the record of right-of-way use not involving attachment to a utility's facilities.[24] If true in practice, the Commission's observation would suggest the need for regulatory intervention to make available the right-of-way access that, until this time, has remained generally unavailable to telecommunications carriers. Indeed, Teligent provided examples in this proceeding of the need for access to utility rights-of-way for the provision of fixed wireless service.[25] The Association for Local Telecommunications Services ("ALTS") recently informed the Commission that building access is of central importance to competitive telecommunications carriers.[26] Moreover, BellSouth predicts demand for bare rights-of-way within buildings to be sufficiently substantial that it expressly provides for such access in its CLEC Information Package.[27] The Commission, too, should recognize the competitive utility and predictable growth in demand for access to bare rights-of-way by prescribing appropriate rules.

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24 Id. at ¶ 120.

25 Teligent Comments at 9 ("Fixed wireless CLECs will seek access to building rooftops through their right-of-way access rights under Section 224.").

26 See Heather Burnett Gold, President, Association for Local Telecommunications Services *En Banc* Presentation before the Federal Communications Commission, Jan. 29, 1998 at 11. ALTS encouraged the Commission to resolve the building access issue through its Section 224 right-of-way authority. Id.

27 Teligent Reply Comments at 14 (quoting Application by BellSouth Corporation for Provision of In-Region, InterLATA Services, CC Docket No. 97-208, *Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina,*

The need for clear and enforceable utility right-of-way access obligations is particularly compelling in light of the resistance of some building owners to allowing competitive carriers to serve the tenants in their buildings. For example, Teligent sought a building access agreement with a large property holding and management company with properties nationwide. This company required an agreement fee of $2,500 per building in addition to space rental of approximately $800 to $1,500 per month per building (or $6,000 per month per building for nodal sites). Moreover, the company refused to negotiate an agreement for fewer than 50 buildings. Finally, as a condition of entering into the agreement, the company insisted that Teligent agree to refrain from making any regulatory filings concerning the building access issue. Yet another large property owner and management company demanded $10,000 per month per building just for access rights to building risers. These onerous and unreasonable conditions quite obviously render competitive telecommunications service an uneconomic enterprise in these buildings.[28] Unless access to utilities' in-building rights-of-way can be gained at just and reasonable rates, the tenants of these buildings may not enjoy the benefits of telecommunications competition.

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Attachment to Affidavit of W. Keith Milner, Appendix A, Exh. WKM-9, "CLEC Information Package: Access to Poles, Ducts, Conduit and Right of Way" at 3 (filed Sep. 30, 1997)).

[28] Teligent ultimately did not enter into agreements with these companies.